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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

EARL SYVESTER BLESSITT, JR.,  
Plaintiff,  
v.  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
Defendant.

Case No. 5:17-cv-01133-KES

MEMORANDUM OPINION AND  
ORDER

**I.**

**BACKGROUND**

On October 15, 2013, Earl Syvester Blessitt, Jr. (“Plaintiff”) filed an application for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) alleging disability commencing August 31, 2008. Administrative Record (“AR”) 218-28.

On January 28, 2016, an Administrative Law Judge (“ALJ”) conducted a hearing at which Plaintiff, who was represented by counsel, appeared and testified, as did a vocational expert (“VE”). AR 41-65. At the hearing, Plaintiff amended his alleged onset date to October 15, 2013, and dropped his DIB claim. AR 54.

On March 9, 2016, the ALJ issued a decision denying Plaintiff’s SSI

1 application. AR 27-40. The ALJ found that Plaintiff suffered from medically  
2 determinable severe impairments consisting of “neuropathy right upper extremity;  
3 cervical spine degenerative disc disease; lumbar spine degenerative disc disease;  
4 [and] atherosclerosis with central retinal artery occlusion.” AR 29. Despite these  
5 impairments, the ALJ determined that Plaintiff had the residual functional capacity  
6 (“RFC”) to perform a limited range of light work: he could lift/carry 20 pounds  
7 occasionally, 10 pounds frequently; stand/walk for six hours; sit six hours;  
8 occasionally climb ramps/stairs, but no ladders, ropes, or scaffolds; occasionally  
9 balance, stoop, kneel, crouch, and crawl; could do no work requiring binocular  
10 vision; should not work with dangerous machinery or around dangerous machinery  
11 or at unprotected heights; and required the use of a cane for balancing when  
12 walking. AR 30.

13 Based on this RFC and the VE’s testimony, the ALJ determined that Plaintiff  
14 could not perform his past relevant work as a truck driver. AR 33. The ALJ found,  
15 however, that Plaintiff could work as a garment bagger, Dictionary of Occupational  
16 Titles (“DOT”) 582.687-010; bakery worker, DOT 524.687-022; and garment  
17 folder, DOT 789.687-066. AR 34. The ALJ concluded that Plaintiff was not  
18 disabled. Id.

## 19 II.

### 20 STANDARD OF REVIEW

21 A district court may review the Commissioner’s decision to deny benefits.  
22 The ALJ’s findings and decision should be upheld if they are free from legal error  
23 and are supported by substantial evidence based on the record as a whole. 42  
24 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue,  
25 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such relevant  
26 evidence as a reasonable person might accept as adequate to support a conclusion.  
27 Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir.  
28 2007). It is more than a scintilla, but less than a preponderance. Lingenfelter, 504

1 F.3d at 1035 (citing Robbins v. Comm’r of SSA, 466 F.3d 880, 882 (9th Cir.  
2 2006)). To determine whether substantial evidence supports a finding, the  
3 reviewing court “must review the administrative record as a whole, weighing both  
4 the evidence that supports and the evidence that detracts from the Commissioner’s  
5 conclusion.” Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). “If the  
6 evidence can reasonably support either affirming or reversing,” the reviewing court  
7 “may not substitute its judgment” for that of the Commissioner. Id. at 720-21.

8 “A decision of the ALJ will not be reversed for errors that are harmless.”  
9 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Generally, an error is  
10 harmless if it either “occurred during a procedure or step the ALJ was not required  
11 to perform,” or if it “was inconsequential to the ultimate nondisability  
12 determination.” Stout v. Comm’r of SSA, 454 F.3d 1050, 1055 (9th Cir. 2006).

### 13 III.

#### 14 ISSUE PRESENTED

15 Plaintiff’s appeal presents the sole issue of whether the ALJ properly  
16 evaluated Plaintiff’s subjective symptom testimony. (Dkt. 21, Joint Stipulation  
17 [“JS”] at 4.)

### 18 IV.

#### 19 DISCUSSION

##### 20 A. Rules Governing the Evaluation of Subjective Symptom Testimony.

21 An ALJ’s assessment of pain level is entitled to “great weight.” Weetman v.  
22 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (citation omitted); see also Nyman v.  
23 Heckler, 779 F.2d 528, 531 (9th Cir. 1986). “[T]he ALJ is not ‘required to believe  
24 every allegation of disabling pain, or else disability benefits would be available for  
25 the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A).’” Molina v.  
26 Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted).

27 If the ALJ finds that a claimant’s testimony as to the severity of his pain and  
28 impairments is unreliable, “the ALJ must make a credibility determination with

1 findings sufficiently specific to permit the court to conclude that the ALJ did not  
2 arbitrarily discredit claimant's testimony." Thomas v. Barnhart, 278 F.3d 947, 958  
3 (9th Cir. 2002). If the ALJ's credibility finding is supported by substantial  
4 evidence in the record, courts may not engage in second-guessing. Id.

5 In evaluating a claimant's subjective symptom testimony, the ALJ engages in  
6 a two-step analysis. Lingenfelter, 504 F.3d at 1035-36. "First, the ALJ must  
7 determine whether the claimant has presented objective medical evidence of an  
8 underlying impairment [that] could reasonably be expected to produce the pain or  
9 other symptoms alleged." Id. at 1036. If so, the ALJ may not reject a claimant's  
10 testimony "simply because there is no showing that the impairment can reasonably  
11 produce the degree of symptom alleged." Smolen v. Chater, 80 F.3d 1273, 1282  
12 (9th Cir. 1996).

13 Second, if the claimant meets the first test, the ALJ may discredit the  
14 claimant's subjective symptom testimony only if he makes specific findings that  
15 support the conclusion. Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010).  
16 Absent a finding or affirmative evidence of malingering, the ALJ must provide  
17 "clear and convincing" reasons for rejecting the claimant's testimony. Lester v.  
18 Chater, 81 F.3d 821, 834 (9th Cir. 1995); Ghanim v. Colvin, 763 F.3d 1154, 1163  
19 & n.9 (9th Cir. 2014).

20 Here, the ALJ issued his decision on March 9, 2016. At that time, Social  
21 Security Ruling ("SSR") 96-7p had not been superseded by SSR 16-3p (which  
22 superseded SSR 96-7p on March 28, 2016). The Court notes that the SSR changes  
23 appear immaterial to the ALJ's analysis in this case. Both SSRs note that, in  
24 assessing a claimant's subjective symptom testimony, ALJs should consider, in  
25 addition to the objective medical evidence: (1) the individual's daily activities;  
26 (2) the location, duration, frequency, and intensity of pain or other symptoms;  
27 (3) factors that precipitate and aggravate the symptoms; (4) the type, dosage,  
28 effectiveness, and side effects of any medication the individual takes or has taken to

1 alleviate pain or other symptoms; (5) treatment, other than medication, the  
2 individual receives or has received for relief of pain or other symptoms; (6) any  
3 measures other than treatment the individual uses or has used to relieve pain or  
4 other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes  
5 every hour, or sleeping on a board); and (7) any other factors concerning the  
6 individual's functional limitations and restrictions due to pain or other symptoms.  
7 Compare SSR 96-7p, 1996 WL 374186, and SSR 16-3p, 2017 WL 5180304; see  
8 also 20 CFR § 416.929 (effective to March 26, 2017, reflecting same factors); see  
9 also Clowser v. Berryhill, No. 16-2044, 2017 WL 5905506, at \*3 (C.D. Cal. Nov.  
10 30, 2017) ("When, as here, the ALJ's decision is the final decision of the  
11 Commissioner, the reviewing court generally applies the law in effect at the time of  
12 the ALJ's decision.").

13 **B. The ALJ's Evaluation of Plaintiff's Testimony.**

14 The ALJ found that while Plaintiff's impairments could reasonably be  
15 expected to cause the alleged symptoms, Plaintiff's testimony "concerning that  
16 intensity, persistence, and limiting effects of these symptoms is not entirely  
17 credible." AR 31. The ALJ gave at least five reasons supporting this finding:  
18 (1) Plaintiff's sporadic work history; (2) inconsistency between Plaintiff's  
19 testimony and the medical evidence, (3) Plaintiff's decision to decline more  
20 aggressive pain treatment, (4) Plaintiff's failure to comply with recommended  
21 treatment, and (5) lack of support from Plaintiff's longitudinal medical records. AR  
22 31-32.

23 **1. Reason One: Plaintiff's Work History.**

24 In evaluating subjective symptom testimony, the ALJ must consider "all of  
25 the evidence presented, including information about your work record ...." 20  
26 C.F.R. § 416.929(c)(3) (text included in version of statute effective before and after  
27 March 27, 2017); see also Thomas, 278 F.3d at 959 (affirming ALJ's finding that  
28 claimant's "extremely poor work history ... negatively affected her credibility

1 regarding her inability to work.”)

2 Regarding Plaintiff’s work history, the ALJ found as follows:

3 A review of the claimant’s work history prior to the alleged onset date  
4 showed the claimant worked sporadically and when he did work, he  
5 did not work full-time work, raising a question as to whether his  
6 continued unemployment is due to facts other than his alleged medical  
7 impairments.

8 AR 31, citing AR 238 (earnings history from 1986-2015). At the hearing, the ALJ  
9 asked Plaintiff why he had so little income in 1990-2006, i.e., years prior to his  
10 initial alleged disability onset date in 2008 and years when Plaintiff would have  
11 been 24 to 40 years old. AR 46. Plaintiff explained that “it was hard finding a job  
12 back then,” in part because he had spent time in jail in the 1990s for selling drugs.  
13 AR 47-48.

14 Plaintiff argues that the ALJ “cannot use [his] work history” to evaluate his  
15 symptom testimony, because the ALJ is “not to delve into wide-ranging scrutiny of  
16 the claimant’s character and apparent truthfulness ....” (JS at 8, citing SSR 16-3p  
17 and Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017).) In Trevizo, the  
18 Ninth Circuit explained that in March 2016, SSR 16-3p superseded SSR 96-7  
19 regarding how the agency evaluates a claimant’s subjective symptom complaints.  
20 Id. The new SSR, however, was “meant to be consistent with our regulatory  
21 language regarding symptom evaluation.” Id. (citing SSR 16-3p). As cited above,  
22 that regulation—both at the time of the ALJ’s decision and now—specifically  
23 instructs the ALJ to consider the claimant’s work record. See 20 C.F.R.  
24 § 416.929(c)(3).

25 Furthermore, focusing on Plaintiff’s work history is not the same as delving  
26 into “wide-ranging scrutiny of the claimant’s character”—such as, e.g., citing a  
27 claimant’s past felony conviction as a reason not to believe his subjective symptom  
28 testimony. Rather, an “extremely poor work history” that shows little motivation to

1 work suggests that it is lack of motivation, rather than symptoms, that prevents a  
2 claimant from working. See Lester–Mahaffey v. Comm’r of SSA, 640 Fed. App’x  
3 627, 629 (9th Cir. 2016) (finding that ALJ properly considered claimant’s limited  
4 work history in concluding that claimant appeared to lack motivation to work  
5 consistently); see also Urieta v. Berryhill, No. 17-02580, 2018 WL 1187525, at \*5  
6 (C.D. Cal. Mar. 7, 2018) (“The ALJ logically inferred that, based on Plaintiff’s  
7 work history, Plaintiff’s impairments may not be the primary reason that she is  
8 unemployed.”).

9 **2. Reason Two: Inconsistency with Medical Evidence.**

10 At the January 2016 hearing, Plaintiff testified that he had used a cane for  
11 “about six years now,” so approximately since January 2010. AR 48. He testified  
12 that he needs the cane to stand from a seated position and to walk even short  
13 distances, such as to the bathroom. AR 49. In April 2014, he wrote in his Function  
14 Report, “Left leg goes out – I walk with my cane.” AR 298.

15 The ALJ summarized Plaintiff’s testimony, including his testimony  
16 concerning his need to use a cane. AR 30. The ALJ then cited the following  
17 medical records (see AR 31), all of which post-date January 2010 and none of  
18 which indicate that Plaintiff has difficulty walking without a cane:

19 • May 2010: Plaintiff was hospitalized following another motorcycle  
20 accident. AR 341. Plaintiff complained of a possible injury to his right leg, but x-  
21 rays showed no leg fractures. Upon discharge, his “pain was well-controlled” and  
22 he “was ambulating.” Id.; see also AR 366 (checking “yes” to “OOB [out of  
23 bed]/Ambulate”) and AR 367 (“ambulating”).

24 • August 2012: Plaintiff’s primary care physician, Richard Jones, noted,  
25 “Gait is described as normal.” AR 389.

26 • October 2012: Plaintiff had a follow-up doctor’s appointment two weeks  
27 after hernia repair surgery. AR 386. At that time, he was taking medication for  
28 back pain but observed to be “in no acute distress.” Id. His spine had a normal

1 range of motion, and a “motor examination reveal[ed] normal tone, bulk and  
2 strength.” Id.

3 • June 2014: Plaintiff was evaluated for central retinal artery occlusion. AR  
4 454. Under objective findings, cardiologist Dr. Patel noted, “Casual gait is within  
5 normal limits.” AR 455.

6 • July and August 2014: Dr. Patel again noted, “Casual gait is within normal  
7 limits.” AR 456, 458.

8 • April 2015: Plaintiff went to the emergency room (“ER”) complaining of  
9 back pain. AR 502. These records say, “no difficulty walking” and “Patient is  
10 ambulatory without any difficulties.” AR 502, 506. These records also state, “he is  
11 driving home and therefore cannot take a narcotic here.”<sup>1</sup> AR 506.

12 • June 2015: Plaintiff went to the ER complaining of a headache and right-  
13 side numbness. AR 470. The resulting physical examination revealed “no motor  
14 deficits” and “normal inspection; normal range of motion” for his extremities. AR  
15 471. Regarding “dizziness/weakness,” the ER staff wrote, “Does not affect  
16 activities.” AR 470.

17 Thus, the ALJ’s finding—that Plaintiff’s testimony regarding needing to use  
18 a cane is inconsistent with the medical evidence—is supported by substantial  
19 evidence. This was another clear and convincing reason to discount Plaintiff’s  
20 subjective symptom testimony, even if the ALJ incorporated using a cane into  
21 Plaintiff’s RFC.

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25 <sup>1</sup> At the hearing, Plaintiff testified, “I haven’t driven since – I’d say probably  
26 2004.” AR 53. When the ALJ questioned him about his motorcycle accidents in  
27 2008 and 2010, he responded, “I won’t get another one of those. ... I can’t even  
28 get on” a motorcycle. AR 53-54. In April 2014, he reported on an Exertion  
Questionnaire that he did not drive. AR 299.



1                   **3. Reasons Three and Four: Failing to Comply with and Declining**  
2                   **Recommended Treatment.**

3           The ALJ noted that in October 2013, Plaintiff declined a spinal injection to  
4   treat his back pain due to fears of complications. AR 31, citing AR 368 (stating,  
5   “Pt referred and saw pain management recently but pt declined to get injection in  
6   the spine due to fear of complications and being paralyzed. Pt reports adequate  
7   pain relief on Norco and Soma. Pt denies adverse effect.”)

8           The ALJ also cited medical records indicating that when Plaintiff was  
9   referred for carotid Doppler testing, he failed to make the appointment. AR 32,  
10   citing AR 435 (Plaintiff told doctor in April 2014 “he will also be having carotid  
11   Doppler testing done”), AR 452 (July 2014 note “Did not have carotid Doppler  
12   ...”). At another appointment in June 2014, the cardiologist noted, “patient does  
13   have hypertension and hypercholesterolemia and is on medication. However, the  
14   patient disclosed that he is noncompliant with medical treatment.” AR 32, citing  
15   AR 454.

16          These were clear and convincing reasons to discount Plaintiff’s subjective  
17   symptom testimony. A claimant’s decision not to follow or receive recommended  
18   treatment can be considered in assessing subjective symptom testimony. See 20  
19   C.F.R. § 416.930(b) (“If you do not follow the prescribed treatment without a good  
20   reason, we will not find you disabled[.]”); Molina, 674 F.3d at 1113 (“We have  
21   long held that, in assessing a claimant’s credibility, the ALJ may proper rely on  
22   unexplained or inadequately explained failure to seek treatment or to follow a  
23   prescribed course of treatment.”); Satter v. Colvin, 2016 WL 1226621, at \*4 (D.  
24   Idaho Mar. 28, 2016) (“[T]he fact that Petitioner may not have followed his medical  
25   providers’ treatment protocols does not mean ipso facto that he is not entitled to  
26   disability benefits; rather, such a circumstance is excused when the reason for not  
27   doing so is justified.”).

28          Plaintiff argues that his fear of receiving a spinal injection was reasonable

1 and justified his refusal. (JS at 14.) Plaintiff cites no evidence concerning the  
2 probability of paralysis or other adverse complications resulting from such a  
3 procedure. Decisions in other cases involving disability benefits characterize  
4 occasional spinal injections to control pain as conservative treatment. Hernandez v.  
5 Colvin, No. 15-1431, 2016 U.S. Dist. LEXIS 33512, at \*36 (C.D. Cal. Mar. 14,  
6 2016) (“Where a claimant receives epidural injections only as needed and the  
7 injections are effective in controlling pain, such injections may constitute  
8 conservative treatment.”); Chavez v. Colvin, No. 14-1547, 2015 U.S. Dist. LEXIS  
9 138807, 2015 WL 5923537, at \*5 (C.D. Cal. Oct. 9, 2015) (finding claimant’s care  
10 conservative where she responded well to injections that were received on an as-  
11 needed basis).

12 Plaintiff also argues that receiving “adequate” pain relief from medication is  
13 not inconsistent with suffering from disabling pain. (JS at 14.) Not so. See Berry,  
14 622 F.3d at 1236 (affirming ALJ’s finding that pain “adequately controlled with  
15 medications” was not “completely disabling”); Warre v. Comm’r of the SSA, 439  
16 F.3d 1001, 1006 (9th Cir. 2006) (“Impairments that can be controlled effectively  
17 with medication are not disabling for the purpose of determining eligibility for SSI  
18 benefits.”). Pain that is “adequately” controlled is, by definition, not causing  
19 significant functional limitations. Thus, the ALJ did not err in relying on Plaintiff’s  
20 medical non-compliance and refusal of a spinal injection in deciding to discount  
21 Plaintiff’s subjective symptom testimony.

#### 22 **4. Reason Five: Lack of Supporting Medical Evidence.**

23 The ALJ reasoned that the objective medical evidence was insufficient to  
24 support the degree of limitations claimed. AR 31. The objective evidence  
25 discussed by the ALJ included an EMG/NCV<sup>2</sup> (AR 460), a computed tomography  
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27 <sup>2</sup> EMG (electromyography) and NCV (nerve conduction velocity) tests are  
28 performed to measure the electrical activity of muscles and nerves. (JS at 6 n.2.)

1 (“CT”) scan of Plaintiff’s cervical spine (AR 542-43), a CT scan of his lumbar  
2 spine (AR 512), and another CT scan of his cervical spine (AR 514). AR 30-32.  
3 Plaintiff argues that pain symptoms “sometimes suggest a greater severity of  
4 impairment than can be shown by medical evidence alone.” (JS at 14.) This is true,  
5 and it is the reason why ALJs cannot discount claimants’ subjective symptom  
6 testimony solely due to lack of supporting objective evidence. Burch, 400 F.3d at  
7 681. ALJs, however, may consider the lack of supporting objective evidence in  
8 combination with other reasons for discounting a claimant’s subjective symptom  
9 testimony. Id.

10 Here, the objective evidence revealed that Plaintiff suffers from degenerative  
11 disc disease, but it did not support the degree of impairment Plaintiff claimed. For  
12 example, the cervical spine CT scan performed in December 2014 showed “no  
13 evidence for spinal stenosis or neuroforaminal encroachment,” conditions  
14 associated with pain. AR 543-43. The later CT scan of his lumbar spine on April  
15 1, 2015, revealed “minimal, early degenerative disease with no significant spinal  
16 stenosis.” AR 512. These relatively mild findings are inconsistent with Plaintiff’s  
17 testimony that his pain is so severe even when taking narcotic pain medication that  
18 he must spend “half of the day lying down” because “there isn’t anything else [he]  
19 could do.” AR 56; see also AR 300 (“I rest all day if I could if no pain”).

## 20 VI.

## 21 CONCLUSION

22 For the reasons stated above, IT IS ORDERED that judgment shall be  
23 entered AFFIRMING the decision of the Commissioner denying benefits.

24  
25 DATED: April 17, 2018

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28 e  
KAREN E. SCOTT  
United States Magistrate Judge